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Craig Caldwell and Robert E. Convington dba Caldwell and Covington v. Anschutz Drilling Company, Inc. : Brief of Appellants in Answer to Respondent's Petition for Rehearing and Supporting Brief

Utah Supreme Court

Hurd, Bayle & Hurd; Wallace R. Lauchnor; Attorneys for Appellants;
Young, Thatcher & Glasmann; John C. Beaslin; Holme, Roberts, More & Owen; Attorneys for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

CRAIG CALDWELL and ROBERT E. COVINGTON, dba CALDWELL AND COVINGTON,
Plaintiffs and Appellants,

vs.

ANSCHUTZ DRILLING COMPANY, INC., a corporation,
Defendant and Respondent.

No. 9587

APPELLANTS' BRIEF IN ANSWER TO RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

Appeal from the Judgment of the
Fourth Judicial District Court for Uintah County,
Hon. Joseph E. Nelson, Judge

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The appellants, having heretofore set forth the facts in their brief on appeal, will confine this brief to answering the points raised by respondent's petition for rehearing.

POINT 1

APPELLANTS WERE NOT REQUIRED TO PROVE BY CLEAR AND CONVINCING EVIDENCE A CASE FOR SPECIFIC PER-

FORMANCE NOR WAS SPECIFIC PERFORMANCE A PROPER ISSUE TO BE DETERMINED ON APPEAL BASED UPON THE PRESENT STATE OF THE TRIAL RECORD.

This Court's opinion of April 3, 1962, and the determination of issues therein, aptly and adequately disposes of all material issues raised on appeal. The petitioner raises issues not supported by the trial record, in its present state, and has not made a showing that a material issue remains unresolved. The respondent suggests in its brief that this Court has failed to rule upon the issue of specific performance. It is respectfully submitted that until the issues of fact have been determined by a jury, the question of specific performance is not material. Certainly counsel for petitioner must be aware of the time-honored rule of law that land and interest therein, being unique, are the proper subject of specific performance.

Without submitting repetitious argument and authorities, it is respectfully suggested that this Honorable Court correctly refused to further burden itself with issues immaterial to a proper determination of the case. Petitioner further claims at page 2 of its brief, that this Court should have applied the rule requiring "clear and convincing" proof by the appellants. The cases referred to by petitioner at pages 21 and 22 of its Brief on Appeal clearly indicate that the facts are in no way similar to those in the instant case. Peti-

tioner has cited cases wherein it was alleged that an "oral contract" existed for the conveyance of real property. In the instant case, it is clear by the contract received in evidence that the parties' agreement was reduced to writing and in fact signed by the petitioner.

POINT II

THE RESPONDENTS, HAVING MADE AN OFFER TO THE APPELLANTS, WHICH OFFER WAS ACCEPTED, WERE NOT PERMITTED TO ORALLY EXTEND THE TIME FOR PAYMENT OF THE EARNEST MONEY, AND THEN, WHEN IT WAS TOO LATE TO CONFORM TO THE TERMS OF THE ORIGINAL CONTRACT, REFUSE TO ABIDE BY THE TERMS OF THE ORAL TIME EXTENSION.

The contract offer and price had been in fact accepted by the appellants and there remained only the matter of payment. Petitioner continues to treat the facts of the case as indicating a mere offer that had never been accepted. The facts, as presented, by the appellants, clearly show that there was a contract reduced to writing and in fact accepted.

The affidavit of W. W. Wakefield, a Vice-President of the Petitioner, clearly shows that at no time did the Petitioner withdraw its offer to the appellants until after it had refused to accept the appellants'

tender of payment. See paragraph 2 of Mr. Wakefield's affidavit on file herein wherein he stated: "Mr. H. O. Lynch, President of Anschutz Drilling Company, Inc., instructed me to accept Mr. Alloway's personal check if it were certified. Mr. Lynch then left the office."

This affidavit, filed by the Petitioner in support of its motion for summary judgment, clearly shows that its offer had been accepted and the time for payment was the only matter in dispute. See also the affidavit filed by Dennis R. Drake, an employee of the Petitioner, wherein he states, in paragraph 2: "On February 16, 1961, Mr. Craig Caldwell, one of the plaintiffs in this matter, telephoned and spoke to me and Mr. H. O. Lynch, President of Anschutz Drilling Company, Inc.; *Mr. Caldwell stated that he would purchase the subject acreage of this action at the price of* $1.25 *per acre. Mr. Caldwell agreed to put up one quarter of the total purchase price as earnest money. He stated that Anschutz Drilling Company, Inc., draw up a contract and mail it to him.*" (Italics ours).

See also the affidavit of Mr. H. O. Lynch, President of the Petitioner company, wherein he states in paragraph 2: "*Mr. Caldwell stated that he would purchase the subject acreage of this action and a cased well in the Horseshoe Bend Block for* $1.25 *per acre and* $3,250.00 *for the well. He asked that Anschutz Drilling Company, Inc., draw up a contract and mail it to him.*" (Italics ours).

Then again in paragraph 5 of Mr. Lynch's affi-

davit, he states: "I advised Mr. Alloway that the check was not acceptable because it was not certified as required by the contract. Mr. Alloway stated that he would get the check certified and return with it. I then authorized Mr. W. W. Wakefield, Vice President of Anschutz Drilling Company, Inc., to accept the check if it were properly certified. I then left the offices of Anschutz Drilling Company, Inc., and did not return the rest of the day of February 24, 1961."

The facts clearly show as evidenced by testimony and affidavits filed by the petitioner that its offer had been accepted and that it tried to evade acceptance of payment. The affidavits further indicate that the petitioner recognized the necessity of accepting payment by certified check if the same could have been procured by Mr. Alloway, as Mr. Lynch so instructed Mr. Wakefield.

POINT 3

THERE IS AMPLE EVIDENCE TO SUPPORT THIS COURT'S FINDING THAT THERE WAS AN OFFER TO SIGN AND DELIVER THE CONTRACT BY APPELLANTS' AGENT.

The record clearly shows that those representing the petitioner consider the offer as having been accepted. Counsel for petitioner continually refers to the contract as "alleged contract" and "proposed written contract."

The contract was reduced to writing and in fact introduced in evidence.

Petitioner also continues its effort to mislead this Court by stating that there was no evidence to indicate an acceptance of the terms of the contract by the appellants. A review of the testimony and affidavits, which, it must be noted, were filed by the Petitioner, clearly indicate that the seller had considered that terms were agreed to by the parties and that acceptance had been made with nothing remaining but payment of the earnest money.

POINT 4

THERE WAS AMPLE EVIDENCE ON WHICH A FINDING COULD BE BASED THAT THE APPELLANTS OFFERED TO SIGN THE WRITTEN CONTRACT AND PAY THE EARNEST MONEY BUT THEIR TENDER WAS REFUSED.

As set forth in appellants' Brief on Appeal, and also noted at page 8 of respondent's brief supporting its petition for rehearing, it appears clear from the testimony of Mr. Alloway that he was ready, willing and able to sign the contract and his offer was refused. It should be also noted that on page 10 of respondent's brief on rehearing, the testimony of Mr. Alloway is clearly to the effect that he offered to deliver cash to the respondent but the same was refused.

POINT 5

THERE WAS AN OFFER TO TENDER CASH TO THE RESPONDENT WHICH WAS REFUSED BY THE PETITIONER.

The testimony of Mr. Alloway is clear that he told Mr. Lynch that he would sign the contract for the appellants. Counsel for petitioner continually refers to the contract as an "unsigned contract." Perhaps counsel has overlooked the fact that petitioner signed the contract before it was mailed to appellants.

The trial record, coupled with the affidavits filed by the employees and officers of the respondent corporation, aptly demonstrates that there was a meeting of the minds as between the parties. The offer to sell by the respondent had in fact been accepted by the appellants and there remained only payment of the earnest money. Appellants maintain that a time extension for payment was granted by the respondent. Even respondent admits that a time extension was orally granted for this payment. The only dispute between the parties at this point is the amount of time extended to the appellants in which to deliver the earnest money to the respondent. This is an issue of fact, to be determined by a jury, and this Honorable Court has so held in its opinion. Appellants will not belabor the point by repetitious argument on issues already fully decided by this Court.

CONCLUSION

It is respectfully submitted that the petition for rehearing should be denied, as there is nothing presented by petitioner to justify a rehearing under the decisions of this Court. In re McKnight, 4 Utah 237, 9 P 299; Brown vs. Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512; Cummings vs. Nielson, 42 Utah 157, 129 Pac. 619.

Respectfully submitted,

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